

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ANNIE TUMMINO, et al.,

Plaintiffs,

v.

ANDREW C. VON ESCHENBACH, in his official capacity as Acting Commissioner of the Food and Drug Administration,

Defendant.

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DECISION AND ORDER

CV 05-366 (ERK)(VVP)

POHORELSKY, Magistrate Judge:

Before the court is the second in a series of *in camera* submissions by the defendant of documents relating to the plaintiffs' second set of document requests which have been withheld from production on the basis of the deliberative process privilege. Pursuant to Judge Korman's direction, this court has been reviewing such documents, *in camera*, for proper assertion of the privilege and evidence of agency bad faith. For its *in camera* review here, the court has followed the same procedure it employed in reviewing the defendant's first submission, separating its findings into three categories and listing them in corresponding appendices.¹ In addition, the court reviews the present submission for duplicativeness, something which the court was unable to do during its first *in camera* review despite having been instructed to do so by Judge Korman because at that time no basis for a comparison had been presented to the court, i.e., those documents already turned over to the plaintiffs. Since such a basis now exists – that

¹After reviewing the defendant's first *in camera* submission, the court issued a decision and order containing three appendices, one for each category of findings. Appendix A listed all documents that were not covered by the deliberative process privilege, Appendix B, documents that evidenced agency bad faith or "reflect viewpoints within the FDA opposed to an age-restricted Plan B OTC-distribution plan," and Appendix C, documents which the defendants had to reassess for proper application of the privilege. (*See Tummino v. von Eschenbach*, No. 05-CV-366, slip op. at 16-19, 24-25, i-iii (E.D.N.Y. Nov. 6, 2006), available at docket entry no. 213.) On appeal, Judge Korman affirmed the court's findings as to Appendices A and C, but deferred ruling on the bad faith documents listed in Appendix B. (*Tummino v. von Eschenbach*, No. 05-CV-366 (E.D.N.Y. Feb. 12, 2007) (memorandum and order granting the defendant's protective order subject to exceptions).)

is, the defendant's first *in camera* submission – the court can now determine whether the documents here are, at the very least, duplicative of those previously withheld by the defendant.

The present submission consists of 52 documents, totaling 150 pages, for which the deliberative process privilege has been asserted. It is also accompanied by a privilege log that has been expanded in form and content to address the court's concerns of insufficiency raised in its November 2006 order. (*See Tummino v. von Eschenbach*, No. 05-CV-366, slip op. at 19-24 (E.D.N.Y. Nov. 6, 2006).) After reviewing the submission, the court finds the deliberative process privilege properly asserted as to all but three of the documents. Those three documents, listed in Appendix A, are not privileged and shall be produced to the plaintiffs for inspection and copying within ten (10) days. Listed in Appendix B are documents that the court finds evidence of agency bad faith. Since many of those documents are duplicative, either in whole or in part, of documents previously submitted by the defendant as part of its first *in camera* submission, the court has also listed the Bates numbers of the corresponding duplicates. Finally, no documents are listed in Appendix C since the present submission, including the privilege log, has provided the court with sufficient information to evaluate the propriety of the defendant's assertion of privilege.

SO ORDERED:

Viktor V. Pohorelsky
VIKTOR V. POHORELSKY
United States Magistrate Judge

Dated: Brooklyn, New York
May 15, 2007

APPENDIX A – NON-PRIVILEGED DOCUMENTS*

Bates Numbers:

TUMMINO – 6733-6735
6772-6774
8068

*TUMMINO-6733-35, 6772-74 are copies of a meeting agenda and essential duplicates of documents this court found to be non-privileged during its first *in camera* review, *cf.* TUMMINO-4081-83; TUMMINO-8068 is an email transmission of a Washington Post article and therefore has no bearing on the deliberative process of the agency.

APPENDIX B – DOCUMENTS EVIDENCING BAD FAITH

Present Submission	Previous Submission (Duplicate)
TUMMINO –	TUMMINO –
8482	1038
1625-28 1997-98 7486-87	
7282-83	
6771 1641-42 7549-50	3928-29
7545-46	
7551-52	
7232-35	5273-76
2044-2047	
7178-82	
8438	
1665	
1561 7563 2013-14 8010-11	1156
1553	
7106-08 6745-47	
6737-38 7160-62	5411-13
7163-64	5409-10
1470	
1546	1235

1984-86 7428 8426 8643 8731 8738	1236-37
1545 1987 7427 7492-93 7507-08 8066-67	5774
7422-24 8094-95	5818-19
1674	